Supreme Court, U.S.
FILED

No. (1)

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In The Supreme Court Of The United States

OCTOBER TERM, 1993

VIRGINIA MADONIA,

Petitioner,

v.

BLUE CROSS AND BLUE SHIELD OF VIRGINIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Did the Court of Appeals commit error in holding, in direct conflict with a sister circuit, that Dr. Madonia, who is the sole shareholder, is an "employee" of his corporation and, therefore, a "participant" in its ERISA plan?

PARTIES TO THE PROCEEDING

The parties to this proceeding are the Petitioner, Virginia Madonia, and the Respondent, Blue Cross and Blue Shield of Virginia.

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PRIOR OPINIONS IN THIS CASE

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Madonia v. Blue Cross & Blue Shield of Virginia, No. 92-0021-D, memorandum opinion (W.D. Va. Dec. 8, 1992).

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was rendered on November 24, 1993. Petitioner now seeks a writ of certiorari, pursuant to 28 U.S.C. §1254.

STATUTORY PROVISIONS (See Appendix)

28 U.S.C. § 1292. Interlocutory decisions

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STATEMENT OF THE CASE

Virginia Madonia ("Madonia") is the wife of Dr. Eugene C. Madonia, who is a neurologist, practicing in Martinsville, Virginia. In 1981, Dr. Madonia founded Martinsville Neurological Associates, Inc. ("MNA"), which is a Virginia corporation. Dr. Madonia is the sole shareholder and director, and he is president of MNA. Madonia is listed as secretary in the corporate books, although she has no official duties. Madonia is not an employee of MNA, and she has not been on the payroll since December 31, 1988.

In July, 1984, Madonia learned that she had breast cancer. She received chemotherapy, and her cancer went into remission; however, in March, 1992, her cancer recurred and was determined to be

metastatic. Her treating physician recommended that she undergo high dose chemotherapy with an autologous bone marrow transplant, but Blue Cross refused to pay for the procedure.

In November 1988, Dr. Madonia applied to Blue Cross for health insurance for himself and his family. Blue Cross issued a group policy, naming Dr. Madonia as the policyholder. MNA has paid Dr. Madonia's premiums on a regular basis.

Madonia originally filed this action in the Circuit Court of Henry County, Virginia. Alleging that the case arises under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001 et seq. ("ERISA"), Blue Cross and Blue Shield of Virginia ("Blue Cross") removed this action to the United States District

Court for the Western District of Virginia in Danville.

Madonia filed a motion to remand, contending that the case does not arise under ERISA and stating that the District Court was without jurisdiction. The District Court denied the motion to remand in a memorandum opinion on December 8, 1992, but certified this case for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b).

Madonia filed a petition for permission to appeal, pursuant to 28 U.S.C. § 1292(b) and Fed. R. App. P. 5. The United States Court of Appeals for the Fourth Circuit granted permission to appeal, and the case was argued before a three judge panel. The Court of Appeals affirmed the District Court's denial of

Madonia's motion to remand in a published opinion on November 24, 1993.

ARGUMENT

THE FOURTH CIRCUIT HAS CREATED A CONFLICT IN THE CIRCUITS AS TO WHETHER A SOLE SHAREHOLDER IS AN EMPLOYEE OF HIS CORPORATION AND, THEREFORE, A PARTICIPANT IN ITS ERISA PLAN, THEREBY LEAVING AN IMPORTANT AREA OF FEDERAL LAW, WHICH GOVERNS INNUMERABLE EMPLOYEE BENEFIT PLANS ACROSS THE COUNTRY, UNSETTLED.

Federal jurisdiction in this case depends upon whether Madonia is a "beneficiary,"[1] which in turn depends upon whether Dr. Madonia is a "participant"[2] under an ERISA plan. If

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[1]ERISA defines "beneficiary" as "a person designated by a participant, or by the terms of the employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. §1002(8).

[2]ERISA defines "participant" as "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit

a sole shareholder of a corporation is not an "employee" within the meaning of ERISA, he or she cannot be a "participant" in an employee benefit plan. Only a participant or beneficiary may bring an ERISA action under the civil enforcement provisions. See 29 U.S.C. §1132. If Dr. Madonia cannot be considered a participant, then Madonia would not be a beneficiary, and there would be no federal jurisdiction over this lawsuit.

A. The First Circuit has held that a sole shareholder is not an employee within the meaning of ERISA.

ERISA defines "employee" as "any individual employed by an employer," 29

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of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit." 29 U.S.C. §1002(7).

U.S.C. § 1002(6), and "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan...." 29 U.S.C. § 1002(5). While these definitions are not a model of legislative clarity, the Fifth Circuit has explained that

> [t]he definitions would tend to support a conclusion requiring the employer and employee to be separate entities, particularly when read in light of the interpretation the terms have been given by the Department of Labor.

Meredith v. Time Ins. Co., 980 F.2d 352, 356 (5th Cir. 1993).

In Kwatcher v. Massachusetts Service Employees Pension Fund, 879 F.2d 957 (1st Cir. 1989), the First Circuit considered the issue of whether a sole shareholder could be considered an employee as defined by ERISA. The Kwatcher court

pointed out that "there are cogent reasons why a sole shareholder should be considered an employer as a matter of 'economic reality.'" Id. at 960. The sole shareholder dominates the actions of the corporation he owns, and he acts "indirectly in the interest of an employer." 29 U.S.C. § 1002(5). Consequently, no distinction between the sole shareholder and his corporation should be observed under ERISA.

Based upon the definitions in ERISA, the Kwatcher court concluded that an "employer" cannot be an "employee" under ERISA. A number of other circuit courts have also held that an employer does not have this "dual status" and is not entitled to benefits under an ERISA plan. See Fugarino v. Hartford Life and Accident Ins. Co., 969 F.2d 178 (6th Cir.

1992); Peckham v. Board of Trustees, 653 F.2d 424 (10th Cir. 1981); and Giordano v. Jones, 867 F.2d 409 (7th Cir. 1989).

In reaching its conclusion that a sole shareholder is an employer and not an employee, the Kwatcher court also considered the regulation of the Secretary of Labor, promulgated pursuant to statutory authorization,[3] which interprets the meaning of "employee" and "employer" within ERISA. The pertinent regulation provides as follows: "[a]n individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse...." 29 C.F.R. § 2510.3-3(c)(1) ("Regulation").

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[3] See 29 U.S.C. § 1135

The First Circuit stated that "[b]y its terms, the regulation unambiguously debars a sole shareholder (such as Kwatcher) from 'employee' status, notwithstanding that he may work for the corporation he owns, shoulder to shoulder with eligible (non-owner) employees." Id. at 961. Under this regulation, Dr. Madonia, the sole shareholder of MNA, cannot be regarded as an employee of MNA.

B. The Fourth Circuit has now held that a sole shareholder is an employee within the meaning of ERISA.

Rejecting the Kwatcher analysis in the case at bar, the Fourth Circuit reasoned incorrectly that Kwatcher "cannot be squared" with Nationwide Mutual Ins. Co. v. Darden, 112 S.Ct. 1344 (1992), in which this Court held that the determination as to who qualifies as an

employee under ERISA should be made according to common law principles. In Darden, this Court adopted a thirteen factor test. In applying this test, the Fourth Circuit mistakenly concluded that "Dr. Madonia meets every common law criterion for being MNA's 'employee'...." Madonia v. Blue Cross and Blue Shield, 93-1057, at 8-9 (4th Cir. November 24, 1993).

One criterion established in Darden is the duration of the relationship between the parties. Since Dr. Madonia is the sole shareholder, he can terminate his relationship with MNA at any time by simply terminating the corporate existence, but MNA has no similar power. Another criterion is whether the hiring party has the right to assign additional projects to the hired party; clearly, MNA

has no right to assign any duties to Dr. Madonia. Another criterion is the extent of the hired party's discretion over when and how long he or she must work. Obviously, MNA has no right to dictate a work schedule to Dr. Madonia. Another criterion is the hired party's role in hiring and paying assistants. It is Dr. Madonia, not MNA, who decides who to hire and fire and how much to pay assistants.

In asserting that Dr. Madonia is an employee of MNA under Darden, the Fourth Circuit ignored all of the above factors. The application of Darden to this case compels the opposite conclusion from that reached by the Fourth Circuit: for the purposes of ERISA Dr. Madonia is not an employee of his corporation, over which he has total control.

The Fourth Circuit further disapproves of Kwatcher and a number of other decisions as failing to address the introductory language of the Regulation: "[f]or purposes of this section." In doing so, the Fourth Circuit relies on a federal district court decision, holding that the Regulation "does not modify the statutory definition of employee for all purposes." Dodd v. John Hancock Mutual Life Ins. Co., 688 F.Supp. 564, 571 (E.D. Cal. 1988). The Fourth Circuit's reliance on Dodd is misplaced. The court in Dodd concluded that "there is simply no basis in ERISA for disregarding the corporate form," Id. at 571, whereas there are in actuality many good reasons for doing so: 1) Kwatcher and other courts have emphasized that Congress intended an "employee" and an "employer"

to be separate entities, 2) a sole shareholder acts "indirectly in the interest of an employer," 29 U.S.C. §1002(5), and 3) a sole shareholder does not need the protection of ERISA.

The Darden decision does not stand for the proposition that the interpretation placed upon ERISA by the Secretary of Labor may be completely disregarded for the sake of common law principles. In Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), the Supreme Court held that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." Id. at 844. An agency's construction of a statutory term is entitled to considerable deference, and any interpretation that is

reasonably defensible should be upheld. Sure-Tan, Inc. v. N.L.R.B., 467 U.S. 883 (1984).

There is a conflict in the circuits as to whether the sole shareholder of a corporation can be considered to be an employee within the meaning of ERISA. Under the holding of the First Circuit, the sole shareholder of a corporation is not an employee, and that person cannot be a participant in an ERISA plan. Thus, ERISA would not govern actions against a health insurance carrier. However, under the holding of the Fourth Circuit in the present case, the sole shareholder of a corporation is an employee of his corporation and a participant in an ERISA plan. Thus, ERISA would govern actions against a health insurance carrier.

MNA is wholly owned by Dr. Madonia. Under the analysis established by the First Circuit in Kwatcher, neither Dr. Madonia nor his wife can be regarded as an employee, and neither can be regarded as a participant, as defined by ERISA and the Regulation. Since only participants and their beneficiaries may sue for benefits under the civil enforcement provisions of ERISA, under the First Circuit's analysis, this action is not governed by ERISA. However, under the Fourth Circuit's analysis, Dr. Madonia is an employee, and, thus, a participant, and this action is governed by ERISA.

This direct conflict between two courts of appeals, which leaves the law in this important area unsettled, needs to be resolved in order to give ERISA the uniform, nationwide application it was

intended to have. If the Fourth Circuit's decision is allowed to stand, federal preemption under ERISA may be determined solely by the venue in which an action is filed. Whether ERISA preempts state law should not depend on the circuit in which the action is filed.

CONCLUSION

The Petitioner, Virginia Madonia, respectfully requests that this Court grant a writ of certiorari to the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully Submitted,

VIRGINIA MADONIA

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

DANVILLE DIVISION

VIRGINIA MADONIA,	)	Civil No.
	)	92-0021-D
Plaintiff,	)	
	)	MEMORANDUM
v.	)	OPINION
BLUE CROSS AND BLUE	)	
SHIELD OF VIRGINIA	)	By: The Hon.
	)	James C. Turk
Defendant .	)	Chief U.S.
		District Judge

This case is before the Court on Plaintiff Virginia Madonia's Motion to Remand to the Circuit Court of Henry County, Virginia, pursuant to 28 U.S.C. § 1447(c). Plaintiff had originally filed suit in the Circuit Court of Henry County, Virginia. Defendant Blue Cross and Blue Shield ("Blue Cross") removed to this Court pursuant to 28 U.S.C. § 1446, alleging that Plaintiff had pled a federal cause of action arising under the Employee Retirement Income Security Act

of 1974, as amended ("ERISA"). Plaintiff responded by filing a motion to remand, alleging her cause of action arises, not under ERISA, but under the statutory and common law of Virginia.

The Court has considered the record, the applicable law, and the arguments presented by counsel at a hearing in this matter on November 4, 1992. The Court will deny Plaintiff's Motion to Remand, and an appropriate Order shall be entered this day.

I. Facts

Dr. Eugene C. Madonia is the Plaintiff's husband. In 1981, he founded Martinsville Neurological Associates, Inc. ("MNA"), a Virginia Corporation. (Dr. Madonia Aff. ¶¶1-2). MNA has four full time employees other than Dr. Madonia. (Dr. Madonia Aff. ¶3). Dr.

Madonia is the only physician. (Dr. Madonia Aff. ¶3). Dr. Madonia is the president and sole shareholder and director of MNA. (Dr. Madonia Aff. ¶3). Although the Plaintiff is listed as MNA's secretary in the corporate books, she is not an employee of MNA. (Dr. Madonia Aff. ¶4). As secretary she has no official duties, and she has not been on the payroll since December 31, 1988. (Dr. Madonia Aff. ¶4).

In November 1988, Dr. Madonia applied to Blue Cross for health insurance for himself and his family under the group plan "Virginia Physicians and Their Staffs." (Dr. Madonia Aff. ¶5). Blue Cross accepted his application and a group policy was issued, naming Dr. Madonia as the policy holder. (Dr. Madonia Aff. ¶6). MNA has always paid

the premiums on Dr. Madonia's policy. The premiums are treated as fringe benefits and are deducted on MNA's federal corporate tax returns. (Dr. Madonia Aff. ¶7).

As stated above, MNA has four full time employees other than Dr. Madonia: Cynthia S. Deal, Sheila M. Martin, Teresa A. Smith and Teresa A. Anglin. In November, 1988, Sheila Martin applied for coverage under the group plan "Virginia Physicians and Their Staffs." (Dr. Madonia Aff. ¶8). She was accepted for coverage by Blue Cross and remained covered under the policy until she chose to discontinue her coverage in November, 1991. (Dr. Madonia Aff. ¶8). MNA paid Ms. Martin's monthly premiums and she reimbursed MNA $50.00 per month. (Dr. Madonia Aff. ¶8). In 1991, her monthly

premium was $136.89. (Kenneth Hein Aff. ¶4). Thus, it appears that Ms. Martin did not reimburse MNA for the full premium amount each month.

Teresa Anglin recently applied for health insurance from Virginia Farm Bureau. (Dr. Madonia ¶9). MNA paid the first month's premium for her coverage. (Dr. Madonia ¶9). Ms. Anglin plans to reimburse MNA for the full amount of the premium payment. (Dr. Madonia ¶9). The loan, however, was not paid as of the November 4, 1992 hearing.

In 1984, Plaintiff was diagnosed with breast cancer. (Complaint ¶3). In March 1992, Plaintiff's physician recommended that she undergo high does chemotherapy with an autologous bone marrow treatment ("HDCT-ABMT"). (Complaint ¶5). In May, Dr. Madonia was

informed that HDCT-ABMT is specifically excluded from coverage under Dr. Madonia's insurance policy. (Complaint ¶14). Thus, Plaintiff has been denied insurance coverage for HDCT-ABMT. Defendant's denial of coverage for this treatment is the basis of Plaintiff's cause of action. The Motion for Judgment filed in Henry County Circuit Court asserted four counts: breach of contract, bad faith breach of contract, intentional infliction of emotional distress, and unfair trade practices.

II. Standards

It is well-settled that the burden is on the defendant in a removal action to show that removal is proper. Salveson v. Western States Bankcard Ass'n, 731 F.2d 1423, 1426 (9th Cir. 1984); Laughlin v. Prudential Ins. Co., 882 F.2d 187, 190

(5th Cir. 1989). If there is doubt as to the right of removal, the case should be remanded. Jones v. General Tire & Rubber Co., 541 F.2d 660, 664 (7th Cir. 1976); Nat'l Audubon Soc. v. Department of Water & Power, 496 F. Supp. 499, 507 (E.D. Cal. 1980).

III. "Employee Benefit Plan"

ERISA is a comprehensive system of federal law which regulates the operations of employee benefits plans. Kwatcher v. Massachusetts Service Employees Pension Fund, 879 F.2d 957 (1st Cir. 1989). Subject to limited exceptions which are irrelevant in the instant case, state laws which "relate to any employee benefit plan" are preempted by ERISA. 29 U.S.C. § 1144(a). Thus, in order to trigger the preemption powers of

ERISA, an "employee benefit plan" must exist.

"Employee welfare benefit plan" is defined as:

> [A]ny plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment...

29 U.S.C. § 1002(1). In Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982), the court set forth the five requirements of an employee welfare benefit plan under § 1002(1): 1) a "plan, fund or program"; 2) established or maintained; 3) by an employer or by an

employee organization or by both, 4) for the purpose of providing medical, surgical, hospital care, sickness, accident, disability, death, unemployment or vacation benefits, apprenticeship or other training programs, day care centers, scholarship funds, prepaid legal services or severance benefits; 5) to participants or their beneficiaries. Id. at 1371.

An ERISA plan may be established rather easily; an employer who does no more than arrange for a group insurance policy may establish such a plan, unless he merely advertises the group insurance policy and makes no contributions to the program on behalf of the employees. Credit Managers Ass'n v. Kennesaw Life & Acc. Ins. Co., 809 F.2d 617, 625 (9th Cir. 1987); 29 C.F.R. § 2510.3-1(j).

A. First Four Requirements under Donovan

The Court finds that, in the instant case, the first four requirements of an employee welfare benefit plan as defined by ERISA and Dodd have been established. The evidence shows that Dr. Madonia enrolled in the group plan "Virginia Physicians and Their Staffs" and that MNA maintained the plan because it paid the premiums for Dr. Madonia and his family and made contributions on behalf of two employees, Sheila Martin and Teresa A. Anglin. Thus, MNA did not merely advertise the plan. Additionally, the evidence shows that the plan's purpose was to provide the type of benefits specified by § 1002(1).

B. Fifth Requirement under Donovan

In order to qualify as an employment welfare benefit plan, the fifth

requirement - that the plan benefit participants or their beneficiaries - must also be met.

"Participant" is defined as:

> [A]ny employee or former employee of an employer or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(7). Because two of MNA's employees benefitted under the plan, the fifth requirement under Donovan is met. Thus, an "employee benefit plan" was in existence. However, even though an "employee benefit plan" may be in existence in the instant case, Plaintiff can bring a civil action under ERISA only if she is a "participant or beneficiary"

under the plan. 29 U.S.C. § 1132(a)(1); Kwatcher, 879 F.2d at 959.

IV. "Participant"

The Court must now determine whether the Plaintiff is a participant or beneficiary of a participant under the plan as is required by 29 U.S.C. § 1132(a)(1). More specifically, the Court must ascertain whether Dr. Madonia, the sole shareholder of a corporation of which he is an employee, is a "participant" under the plan.

"Participant" is defined as:

> [A]ny employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. 1002(7). Thus, in order for Dr. Madonia to qualify as a "participant", he must be an employee of MNA.

The courts that have addressed the issue of whether a sole shareholder of a corporation is entitled to "dual status" as both an employer and employee are in disagreement. See, e.g., Kwatcher v. Massachusetts Service Employees Pension Fund, 879 F.2d 957 (1st Cir. 1989) (sole shareholder of a corporation seeking to be included in an ERISA-regulated retirement plan is not an employee for purposes of defining "participant" under 1132(a)(1); but see, Dodd v. John Hancock Mutual Life Ins. Co., 688 F. Supp. 564 (E.D. Cal. 1988) (even though plaintiff is not an employee and, hence, a "participant" for purposes of determining

whether an "employee welfare benefit plan" exists, he is an employee for purposes of determining whether he is a "participant" under 1132(a)(1)).

The Dodd and Kwatcher courts reached opposite conclusions due to differing interpretations of a regulation issued by the Secretary of Labor[4] to clarify the meaning of "employee benefit plan" as it pertains to Title I of ERISA:

> For purposes of this section: (1) An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse...

29 C.F.R. 2510.3-3(c)(1).

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[4] Pursuant to statutory authorization, the Secretary of Labor has issued regulations "necessary or appropriate to carry out the provisions of Part I." 29 U.S.C. § 1135.

The Kwatcher court examined 29 C.F.R. § 2510.3-3(c)(1) and concluded that it applied, not only to a determination of "employee benefit plan", but also to "participant" under 29 U.S.C. § 1002(7):

> By its terms, the regulation unambiguously debars a sole shareholder (such as Kwatcher) from "employee" status, notwithstanding that he may work for the corporation he owns, shoulder to shoulder with eligible (non-owner) employees.

Kwatcher, 879 F.2d at 961.

In Dodd, the court found that the definition of employee in 29 C.F.R. 2510.3-3(c)(1) pertains only to the section defining "employee benefit plan," and not to the definition of employee throughout Title I of ERISA. Dodd, 688 F. Supp. at 570. Thus, the Dodd court held that, even though 29 C.F.R. 2510.303(c)(1) precludes a sole

shareholder or his spouse from being an employee and therefore a participant for purposes of determining whether an "employee benefit plan exists", a sole shareholder may be considered an employee for purposes of determining whether he is a "participant" as is required by 29 U.S.C. § 1132(a)(1). Id. at 571.

This Court is in agreement with the reasoning of the Dodd court, not only because the Dodd court's reading of the regulation at issue is the most natural interpretation, but also because Dr. Madonia has consistently benefitted from the corporate status of his business, and he should not be permitted to deny that status in order to avoid being subject to ERISA regulation.

Any claim brought by Dr. Madonia, therefore, is governed by ERISA. As is

stated above, a "beneficiary" is also eligible under 29 C.F.R. § 1132(a)(1) to bring suit under ERISA. Mrs. Madonia is Dr. Madonia's beneficiary[5]; thus, her claim against Defendant Blue Cross is governed by ERISA and is properly before this Court.

/s/ James C. Turk
Chief U.S. District Judge

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[5] "Beneficiary" is defined as: [A] person designated by a participant or by the terms of the employee benefit plan, who is or may become entitled to a benefit thereunder. 29 U.S.C. § 1002(8).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

DANVILLE DIVISION

VIRGINIA MADONIA,	)	
	)	
Plaintiff,	)	Civil No.
	)	92-0021-D
v.	)	
	)	
BLUE CROSS AND BLUE SHIELD OF VIRGINIA	)	ORDER
	)	
	)	
Defendant.	)	
	)	

In accordance with the Memorandum Opinion entered this day, it is hereby

ADJUDGED AND ORDERED

that Plaintiff's Motion to Remand this case to the Circuit Court of Henry County, Virginia is DENIED.

The Clerk of court is directed to send certified copies of this Order to all parties of record.

ENTER: This 8th day of December, 1992.

/s/ James C. Turk
Chief U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

DANVILLE DIVISION

VIRGINIA MADONIA,	)	
	)	
Plaintiff,	)	Civil No.
	)	92-0021-D
v.	)	
	)	
BLUE CROSS AND BLUE SHIELD OF VIRGINIA	)	ORDER
	)	
	)	
Defendant.	)	

The Court is of the opinion that the Court's November 8, 1992 Order denying Plaintiff's Motion to Remand involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of this litigation. Accordingly, the parties may, within ten (10) days of the entry of this Order, petition the United States

Court of Appeals for the Fourth Circuit for permission to appeal pursuant to 28 U.S.C. § 1292(b) and Fed. R. App. P. 5. As the Plaintiff has indicated her desire to pursue such an interlocutory appeal, all further proceedings in this matter shall be stayed, pending the outcome of her petition for permission to appeal the Court's November 8, 1992 Order. The Court notes Defendant's exception to the entry of today's Order.

The Clerk of the Court is directed to send certified copies of this Order to all parties of record.

Entered: This 16th day of December, 1992.

/s/ James C. Turk
Chief U.S. District Judge

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
January 19, 1993

No. 92-8116
CA-92-21-D

VIRGINIA MADONIA
Petitioner

v.

BLUE CROSS & BLUE SHIELD OF VIRGINIA
Respondent

O R D E R

Petitioner has filed a petition for permission to appeal an interlocutory order pursuant to 28 U.S.C. 1292(b).

The Court grants the petition for permission to appeal.

Entered at the direction of Judge Hall, with the concurrence of Judge Wilkinson and Judge Niemeyer.

For the Court,

/s/ Bert M. Montague

Clerk

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

VIRGINIA MADONIA, Plaintiff-Appellant, v. BLUE CROSS & BLUE SHIELD OF VIRGINIA, Defendant-Appellee.	No.93-1057

Appeal from the United States District Court for the Western District of Virginia, at Danville.
James C. Turk, District Judge.
(CA-92-21-D)

Argued: September 29, 1993
Decided: November 24, 1993

Before WILKINSON, LUTTIG, and WILLIAMS, Circuit Judges.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Luttig and Judge Williams joined.

COUNSEL

ARGUED: James Warren Haskins, YOUNG, HASKINS, MANN & GREGORY, P.C.,

Martinsville, Virginia, for Appellant. James P. McElligott, Jr., MCGUIRE, WOODS, BATTLE & BOOTHE, Richmond, Virginia, for Appellee. **ON BRIEF:** G. Carter Greer, YOUNG, HASKINS, MANN & GREGORY, P.C., Martinsville, Virginia, for Appellant. Gilbert E. Schill, Jr., Catherine Currin Hammond, David F. Dabbs, MCGUIRE, WOODS, BATTLE & BOOTHE, Richmond, Virginia; Jeanette D. Rogers, BLUE CROSS AND BLUE SHIELD OF VIRGINIA, Richmond, Virginia, for Appellee.

OPINION

WILKINSON, Circuit Judge:

The question before us is whether a closely held corporation that subsidized health insurance policies for several of its employees has established an "employee welfare benefit plan" under the Employee Retirement Income Security Act, 29 U.S.C. §1001, et seq. Here we find that it has. In addition, we hold that a sole shareholder employed by the corporation and insured under the health policy provided by the corporation is a

"participant" in the company's ERISA plan. Accordingly, we affirm the judgment of the district court.

I.

In 1981, Dr. Eugene Madonia founded Martinsville Neurological Associates, Inc. ("MNA"), a Virginia corporation. Since MNA's founding, Dr. Madonia has served as its director, president, and sole shareholder. In addition to Dr. Madonia, MNA has four other full-time employees: Teresa Anglin, Cynthia Deal, Sheila Martin, and Teresa Smith. Dr. Madonia is the only physician employed by MNA.

On November 7, 1988, Dr. Madonia applied for health insurance under the "Virginia Physicians and Their Staffs" group plan offered by Blue Cross & Blue Shield of Virginia ("BC/BS"). BC/BS

issued a group policy naming Dr. Madonia as the policy holder and listing his family members as the beneficiaries. Since that time, MNA has paid all premiums for the Madonias' health insurance and deducted the payments on its corporate tax returns as employee fringe benefits.

MNA's purchase of the "Virginia Physicians and Their Staffs" policy for Dr. Madonia made the remaining MNA employees eligible for coverage under the same group plan by virtue of their employment affiliation with Dr. Madonia. Sheila Martin took advantage of this opportunity by applying for the BC/BS group plan on November 8, 1988. BC/BS accepted her application and provided coverage until November 1991, when Ms. Martin voluntarily discontinued the

policy. During that time, MNA made direct payments to BC/BS for Ms. Martin's monthly premiums. The premiums varied in amount but reached $136.89 in 1991. MNA deducted $50.00 from Ms. Martin's monthly paycheck for partial reimbursement.

In August 1992, Teresa Anglin, another MNA employee, obtained a health insurance policy from another company, Virginia Farm Bureau. MNA gave Ms. Anglin an interest-free loan for her first monthly premium and increased her salary so that she could afford subsequent monthly premiums. MNA did not pay for or contribute to the other two employees' health insurance policies.

In 1984, plaintiff-appellant Virginia Madonia, Dr. Madonia's wife, was diagnosed with breast cancer. When the cancer recurred in March 1992, Mrs.

Madonia's physician recommended high dose chemotherapy with an autologous bone marrow transplant ("HDCT-ABMT"). In May 1992, BC/BS informed Mrs. Madonia that HDCT-ABMT was an "experimental" treatment not covered under her policy. Mrs. Madonia sued BC\BS in state court for breach of contract, bad faith breach of contract, intentional infliction of emotional distress, and unfair trade practices. BC/BS removed the case to federal district court on the ground that Madonia's suit was governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001, et seq. In response, Mrs. Madonia filed a motion to remand.

The district court denied Madonia's motion for remand. The court found that MNA had established an ERISA "employee

welfare benefit plan" by paying for and contributing to three of its employees' health insurance plans. The Court further found that Mrs. Madonia had standing to sue under ERISA as a plan "beneficiary" because Dr. Madonia was an "employee" of MNA and thus a "participant" in MNA's ERISA plan. Based on these two findings, the court held that remand would be improper because Madonia's state claims were preempted by ERISA under 29 U.S.C. §1144(a).

This interlocutory appeal followed. See 28 U.S.C. §1292(b).

II.

ERISA preempts all state claims that "relate to any employee benefit plan." 29 U.S.C. §1144(a). In order for Madonia's state law claims to be preempted by ERISA, two criteria must be

met: first, an "employee benefit plan" must exist; second, Madonia must have standing to sue as a "participant" or "beneficiary" of that employee benefit plan. We address each criterion in turn.

A.

Madonia contends that her state law claims are not preempted by ERISA because an "employee benefit plan" did not exist. Our inquiry into the existence of an "employee benefit plan" must begin, as always, with the language of the statute. ERISA defines "employee benefit plan" as either an "employee pension benefit plan" or an "employee welfare benefit plan." 29 U.S.C. §1002(3). ERISA further defines "employee welfare benefit plan" as:

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee

> organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness....

29 U.S.C. §1002(1). This statutory definition can be broken down into five elements: "(1) a 'plan, fund, or program' (2) established or maintained (3) by an employer... (4) for the purpose of providing medical, surgical, hospital care, [or] sickness...benefits (5) to participants or their beneficiaries." Donovan v. Dillingham, 688 F.2d 1367, 1371 (11th Cir. 1982) (en banc).

Madonia argues that the second and fifth elements of the above definition have not been met. We think, however, that the evidence shows that MNA established a plan to help its employees

obtain health insurance. In our view, this plan meets all five prongs of the Donovan test and therefore constitutes an ERISA "employee welfare benefit plan."

We note as a threshold matter that a "plan, fund, or program" is in existence. See 29 U.S.C. §1002(1). MNA's plan can be defined as a program to assist MNA employees in obtaining and financing health insurance from insurance carriers of their choice. The fact that MNA's plan respects an employee's choice of carrier does not render the plan too ill-defined under ERISA. To the contrary, the parameters of MNA's plan are readily ascertainable: the intended benefit is health insurance coverage; the beneficiaries include MNA's employees who seek help with their health insurance payments; the source of financing is MNA

and its employees; and the procedure for receiving benefits is submission of claims to the employees' own insurance companies. We therefore conclude that a sufficiently defined "plan" exists. See Donovan, 688 F.2d at 1373 (holding that an ERISA "plan" exists "if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits").

Madonia asserts, however, that even if a "plan" exists, MNA's actions are insufficient to satisfy the second prong of the Donovan test -- establishment or maintenance of the plan. She claims that MNA did no more than purchase insurance for Dr. Madonia, and that, under Taggart Corp. v. Life & Health Benefits Admin.,

Inc., 617 F.2d 1208 (5th Cir. 1980), the bare purchase of health insurance in and of itself does not constitute the "establishment" of an ERISA plan. See id. at 1211. The flaw in Madonia's argument is that "[t]he ERISA definition of 'employee welfare benefit plan' specifically allows that ERISA plans may be established 'through the purchase of insurance or otherwise.' 29 U.S.C. §1002(1)." International Resources, Inc. v. New York Life Ins. Co., 950 F.2d 294, 297 (6th Cir. 1991); see also Memorial Hosp. Sys. v. Northbrook Life Ins. Co., 904 F.2d 236, 240 (5th Cir. 1990). Under this statutory definition, employers may easily establish ERISA plans by purchasing insurance for their employees. See Libbey-Owens-Ford v. Blue Cross & Blue Shield Mutual of Ohio, 982 F.2d

1031, 1034 (6th Cir. 1993); see also Fugarino v. Hartford Life & Accident Ins. Co., 969 F.2d 178, 184 (6th Cir. 1992) (stating that "the bare purchase of insurance...may be evidence of the existence of an ERISA plan"); Brundage-Peterson v. Compcare Health Servs. Ins. Corp., 877 F.2d 509, 511 (7th Cir. 1989) (noting that a "barebones plan" under which the employer merely arranges and pays for insurance plans invokes ERISA protection); Credit Managers Assoc. v. Kennesaw Life & Accident Ins. Co., 809 F.2d 617, 625 (9th Cir. 1987) (same).

In recognition of this statutory language, the Fifth and Eleventh Circuits have retreated from Taggart and, instead, adopted the well-established rule that "payment of premiums on behalf of ... employees is 'substantial evidence that a

plan, fund or program (was) established.'" Kidder v. H&B Marine, Inc., 932 F.2d 347, 353 (5th Cir. 1991) (quoting Donovan, 688 F.2d at 1373). Under that standard, MNA's actions are more than sufficient to show the "establishment" of a plan. MNA paid all of Dr. Madonia's premiums. MNA also made direct payments to BC/BS for Ms. Martin's premiums and then deducted only one-third of the insurance cost from Ms. Martin's pay. In addition, MNA provided Ms. Anglin with an interest-free loan and a salary increase so that she could pay her health insurance premiums. This arrangement not only required MNA to spend its corporate funds on employee insurance, but also involved additional administrative tasks: adjusting salaries, making payroll deductions, and

taking corporate tax deductions to reflect these employee fringe benefits. Other circuits facing similar facts have found the "establishment or maintenance" of an ERISA plan. See, e.g., Memorial Hosp., 904 F.2d at 241 (finding that an employer "established" a plan by paying insurance premiums for its employees and then seeking reimbursement through payroll deductions). MNA's actions here are well within the ambit of such holdings.

Madonia's final contention is that the last prong of the Donovan test -- the existence of a plan "participant" -- has not been met. ERISA defines "participant" as

> any employee or former employee of an employer...who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer... or whose beneficiaries

> may be eligible to receive any such benefit.

29 U.S.C. §1002(7). Department of Labor regulations further provide that the plan must involve at least one employee other than the corporation's sole owner to satisfy the "participant" requirement. See 29 C.F.R. §§2510.3-3(b) & 2510.3-3(c)(1). Madonia claims that MNA's plan was not an "employee welfare benefit plan" because no MNA employee met the statutory and regulatory definitions of "participant" at the time of removal.

We disagree. It is true that Dr. Madonia cannot be considered a "participant" for purposes of determining the existence of an employee benefit plan. See 29 C.F.R. §2510.3-3(c)(1). However, MNA's plan benefitted employees other than Dr. Madonia. Ms. Martin is the most obvious example. MNA paid two-

thirds of her health insurance premiums for three years. Even though she voluntarily terminated her BC/BS coverage in 1991, she remained eligible to renew her insurance coverage by virtue of her employment at MNA. Ms. Anglin is also obviously a "participant" in MNA's plan. MNA helped her finance health insurance payments through an interest-free loan and a salary raise. The other two employees -- Ms. Deal and Ms. Smith -- benefitted from MNA's plan as well. They both became eligible for coverage under BC/BS's "Virginia Physicians and Their Staffs" group plan as a result of MNA's purchase of a group policy for Dr. Madonia. Each of MNA's four staff employees "is or may become eligible to receive a benefit of any type from an employee benefit plan." See 29 U.S.C.

§1002(7). Therefore, they have been and remain "participants" in MNA's plan.

In enacting ERISA, Congress designed a comprehensive system of regulating employee benefit plans in order "to provide the maximum degree of protection to working men and women" whose employers provide benefits. S. Rep. No. 127, 93rd Cong. 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 4838, 4854. In this case, a corporation set about subsidizing and financing the purchase of health insurance for its employees: it invested corporate funds, time and effort in establishing the program, and it received benefits in the form of tax deductions for those efforts. This certainly is an ERISA employee welfare benefit plan. To say otherwise would deprive MNA employees of the protections ERISA plainly

provides,[1] and would thereby place a restrictive gloss on what Congress intended to be a comprehensive statute.

B.

Madonia contends that even if MNA established an ERISA plan, her state claims are not preempted because she does not have standing to sue under ERISA. ERISA confers standing upon "participants" and "beneficiaries" of an ERISA plan. See 29 U.S.C. §1132(a)(1). In order for Mrs. Madonia to have

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[1]See 29 U.S.C. §1001(b) ("It is hereby declared to be the policy of [ERISA] to protect...the interest of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.")

standing as a "beneficiary," Dr. Madonia must have been a "participant" in MNA's employee welfare benefit plan. See 29 U.S.C. §1002(8). ERISA's definition of "participant" in turn requires that Dr. Madonia be an "employee" of MNA. See 29 U.S.C. §1002(7). Madonia argues that Dr. Madonia is not an "employee" of MNA, and thus could not have been a plan "participant."

We disagree. Dr. Madonia qualifies as MNA's "employee" under ERISA's definition of that term and the Supreme Court's interpretation of that definition. ERISA defines "employee" as "any individual employed by an employer." 29 U.S.C. §1002(6). Dr. Madonia plainly falls within this broad definition: he is an "individual," and he admits that he is "employed by" MNA. This does not end

our analysis, however. The Supreme Court recently declared that this statutory definition is "completely circular and explains nothing," and therefore adopted "a common-law [agency] test for determining who qualifies as an 'employee' under ERISA...." Nationwide Mutual Ins. Co. v. Darden, 112 S. Ct. 1344, 1348 (1992). The Court has directed that we consider factors such as the "duration of the relationship between the parties[,]...the method of payment[,]...and the tax treatment of the hired party" in determining "employee" status. See id. Dr. Madonia meets every common law criterion for being MNA's "employee": he draws a salary from MNA; MNA's tax forms list Dr. Madonia as its employee; and Dr. Madonia himself listed MNA as his "employer" on the BC/BS group

plan application. Plainly, Dr. Madonia is MNA's "employee" under the Darden test.

Madonia challenges this conclusion on the ground that Dr. Madonia's status as MNA's sole shareholder bars him from being MNA's "employee." Her challenge is two-fold. First, she relies on Kwatcher v. Massachusetts Serv. Employees Pension Fund, 879 F.2d 957 (1st Cir. 1989), which held that sole shareholders do not fall within the statutory definition of "employee" because (1) sole shareholders function as "employers" for purposes of ERISA, and (2) a person cannot simultaneously be both an "employer" and an "employee." See id. at 959-60. In construing the ERISA definitions of "employer" and "employee," the Kwatcher court specifically rejected the "common

law principles" approach to the statutory definition of employee. See id. at 960. Kwatcher, however, cannot be squared with the Supreme Court's subsequent holding in Darden. In Darden, as we have noted, the Supreme Court explicitly directed lower courts to use common law principles in defining these statutory terms. Darden, 112 S. Ct. at 1349. To discern common law principles applicable her, we must look to Virginia law. Virginia courts have "long recognized the basic proposition that a corporation is a legal entity separate and distinct from its shareholders." Perpetual Real Estate Servs., Inc. v. Michaelson Properties, Inc., 974 F.2d 545, 547-48 (4th Cir. 1992). Virginia law permits disregard of the corporate form only in "extraordinary" circumstances warranting

corporate veil-piercing. See id. at 548. Respect for this principle compels us to recognize MNA's corporate identity as the "employer" and Dr. Madonia's separate identity as MNA's "employee." See International Bhd. of Painters and Allied Trades Union v. George A. Kracher, Inc., 856 F.2d 1546, 1547-50 (D.C. Cir. 1988) (focusing on limited liability principles to hold that the CEO and principal shareholder of a corporation is not "an employer" for ERISA purposes).[2]

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[2]Madonia points to three other cases for the proposition that sole business owners are "employers" and cannot simultaneously be considered "employees" -- Meredith v. Time Ins. Co., 980 F.2d 352, 356-57 (5th Cir. 1993); Fugarino, 969 F.2d at 186; and Giardono v. Jones, 867 F.2d 409, 411-12 (7th Cir. 1989). All three cases are different from the present case in that they involved sole proprietors of unincorporated businesses which, by definition, have no separate legal identity. By contrast, this case deals with a sole shareholder of a corporation that has a separate legal

Second, Madonia points to a DOL regulation dealing with the existence of an "employee benefit plan," which provides:

> For purposes of this section: (1) An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse....

29 C.F.R. §2510.3-3(c) (emphasis added). Madonia contends that this regulation governs the definition of "employee" throughout ERISA and thereby precludes Dr. Madonia from being deemed an "employee" or a plan "participant."

Madonia, however, overlooks the introductory clause of the regulation: "[f]or purposes of this section."

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identity. The question of a sole proprietorship is not one that is before us.

"[T]his section" refers to 29 C.F.R. §2510.3-3, which deals exclusively with the determination of the existence of an "employee benefit plan." Therefore, by its very terms, the regulation's exclusion of sole business owners from the definition of "employee" is "limited to its self-proclaimed purpose of clarifying when a plan is covered by ERISA and does not modify the statutory definition of employee for all purposes." Dodd v. John Hancock Mutual Life Ins. Co., 688 F. Supp. 564, 571 (E.D. Cal. 1988). The cases on which Madonia relies simply fail to address the import of the introductory language of this regulation. See Kwatcher, 879 F.2d at 960-62; Peckham v. Board of Trustees of the Int'l Bhd. of Painters and Allied Trades Union, 653 F.2d 424, 427 (10th Cir. 1981).

Specifically, the regulation does not govern the issue of whether someone is a "participant" in an ERISA plan, once the existence of that plan has been established. This makes perfect sense: once a plan has been established, it would be anomalous to have those persons benefitting from it governed by two disparate sets of legal obligations.

Our reading of the statute works no inequity. "[W]hen self-employed individuals elect to incorporate and the corporation employs others, there is simply no basis in ERISA for disregarding the corporate form." Dodd, 688 F. Supp. at 571. Dr. Madonia chose to operate his neurological practice as a Virginia corporation. He has enjoyed the recognized benefits of the corporate form with regard to limited liability and

corporate tax deductions. Indeed, if other MNA employees were to sue Dr. Madonia as an "employer" for ERISA liability, the corporate form would shield him. See, e.g., Scarbrough v. Perex, 870 F.2d 1079, 1082-84 (6th Cir. 1989) (holding that the principal shareholder and CEO of a corporation is not an "employer" and, thus, cannot be subject to ERISA liability except in cases involving corporate veil piercing); Kracher, 856 F.2d at 1547-50 (same); Operating Engineers Pension Trust v. Reed, 726 F.2d 513, 515 (9th Cir. 1984) (same). As the district court stated, "Dr. Madonia has consistently benefitted from the corporate status of his business, and he should not be permitted to deny that status in order to avoid being subject to ERISA regulation."

By concluding that sole shareholders can be considered "participants" in their companies' employee welfare benefit plans, we likewise avoid the situation in which two separate bodies of law would govern a corporation's employee benefits claims. In this particular case, it would seem anomalous to have Madonia seeking recovery under state law theories and Anglin and Martin suing under ERISA. In enacting ERISA, Congress drafted its "'most sweeping federal preemption statute'" in order to achieve uniformity and consistency in the law governing employee benefits. Holland v. Burlington Indus., Inc., 772 F.2d 1140, 1146 (4th Cir. 1985), aff'd sub nom. Brooks v. Burlington Indus., Inc., 477 U.S. 901 (1986) (citation omitted). Disallowing shareholders such as Dr. Madonia from

being plan "participants" would result in disparate treatment of corporate employees' claims, thereby frustrating the statutory purpose of ensuring similar treatment for all claims relating to employee benefit plans.

III.

MNA established a plan to assist its employees in obtaining and financing health insurance coverage. Dr. Madonia is a "participant" in that plan, and Mrs. Madonia has standing to sue as Dr. Madonia's plan "beneficiary." Accordingly, Mrs. Madonia's state law claims relating to that plan were preempted and governed by ERISA, and removal to federal court was proper. The judgment of the district court is

AFFIRMED.

STATUTORY PROVISIONS

28 U.S.C. § 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceeding in the district court unless the district judge of the Court of Appeals or a judge thereof shall so order.

29 U.S.C. § 1002. Definitions

For purposes of this title:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the

purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 [29 U.S.C. § 186(c)] (other than pensions on retirement or death, and insurance to provide such pensions).

(2) (A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program --

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this Act providing one or more exempt categories under which --

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of

the increases in the cost of living (as determined by the Secretary of Labor) since retirement,

shall, for purposes of this title, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this Act applicable to pension plans, such arrangement or payment shall be treated as a pension plan.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

(4) The term "employee organization" means any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment

relationships; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan.

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of any employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

(6) The term "employee" means any individual employed by an employer.

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

(8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

(9) The term "person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

29 U.S.C. § 1003. Coverage

(a) Except as provided in subsection (b) and in sections 201, 301, and 401 [29 U.S.C. §§ 1051, 1081, and 1101], this title shall apply to any employee benefit plan if it is established or maintained --

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

29 U.S.C. § 1132. Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought --

(1) by a participant or beneficiary --

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 U.S.C. § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 U.S.C. § 1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (l).

29 U.S.C. § 1135. Regulations

Subject to title III and section 109 [29 U.S.C. § 1029], the Secretary may prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this title. Among other things, such regulations may define accounting, technical and trade terms used in such provisions; may prescribe forms; and may provide for the keeping of books and records, and for the inspection of such books and records (subject to section 504(a) and (b) [29 U.S.C. § 1134(a) and (b)].

29 C.F.R. § 2510.3-3

(a) General. This section clarifies the definition in section 3(3) of the term "employee benefit plan" for purposes of Title I of the Act and this chapter. It states a general principle which can be applied to a large class of plans to determine whether they constitute employee benefit plans within the meaning of section 3(3) of the Act. Under section 4(a) of the Act, only employee benefit plans within the meaning of section 3(3) are subject to Title I.

(b) Plans without employees. For purposes of Title I of the Act and this chapter, the term "employee benefit plan"

shall not include any plan, fund or program, other than an apprenticeship or other training program, under which no employees are participants covered under the plan, as defined in paragraph (d) of this section. For example, a so-called "Keogh" or "H.R. 10" plan under which only partners or only a sole proprietor are participants covered under the plan will not be covered under Title I. However, a Keogh plan under which one or more common law employees, in addition to the self-employed individuals, are participants covered under the plan, will be covered under Title I. Similarly, partnership buyout agreements described in section 736 of the Internal Revenue Code of 1954 will not be subject to Title I.

(c) Employees. For purposes of this section:

(1) An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse, and

(2) A partner in a partnership and his or her spouse shall not be deemed to be employees with respect to the partnership.

(d) Participant covered under the plan.

(1) (i) An individual becomes a participant covered under an

employee welfare benefit plan on the earlier of --

(A) The date designated by the plan as the date on which the individual begins participation in the plan;

(B) The date on which the individual becomes eligible under the plan for a benefit subject only to occurrence of the contingency for which the benefit is provided; or

(C) The date on which the individual makes a contribution to the plan, whether voluntary or mandatory.

(ii) An individual becomes a participant covered under an employee pension plan --

(A) In the case of a plan which provides for employee contributions or defines participation to include employees who have not yet retired, on the earlier of --

(1) The date on which the individual makes a contribution, whether voluntary or mandatory, or

(2) The date designated by the plan as the date on which the individual has satisfied the

plan's age and service requirements for participation, and

(B) In the case of a plan which does not provide for employee contributions and does not define participation to include employees who have not yet retired, the date on which the individual completes the first year of employment which may be taken into account in determining --

(1) Whether the individual is entitled to benefits under the plan, or

(2) The amount of benefits to which the individual is entitled, whichever results in earlier participation.

(2) (i) An individual is not a participant covered under an employee welfare plan on the earliest date on which the individual --

(A) Is ineligible to receive any benefit under the plan even if the contingency for which such benefit is provided should occur, and

(B) Is not designated by the plan as a participant.

(ii) An individual is not a participant covered under an employee pension plan or a beneficiary receiving benefits under an employee pension plan if --

(A) The entire benefit rights of the individual --

(1) Are fully guaranteed by an insurance company, insurance service or insurance organization licensed to do business in a State, and are legally enforceable by the sole choice of the individual against the insurance company, insurance service or insurance organization; and

(2) A contract, policy or certificate describing the benefits to which the individual is entitled under the plan has been issued to the individual; or

(B) The individual has received from the plan a

lump-sum distribution or a series of distributions of cash or other property which represents the balance of his or her credit under the plan.

(3) (i) In the case of an employee pension benefit plan, an individual who, under the terms of the plan, has incurred a one-year break in service after having become a participant covered under the plan, and who has acquired no vested right to a benefit before such break in service is not a participant covered under the plan until the individual has completed a year of service after returning to employment covered by the plan.

(ii) For purposes of paragraph (d)(3)(i) of this section, in the case of an employee pension benefit plan which is subject to section 203 of the Act the term "year of service" shall have the same meaning as in section 203 (b)(2)(A) of the Act and any regulations issued under the Act and the term "one-year break in service" shall have the same meaning as in section 203 (b)(3)(A) of the Act and any regulations issued under the Act.

CERTIFICATE OF SERVICE

I certify that pursuant to counsel instructions, I mailed by certified mail, return receipt requested FORTY (40) copies of the foregoing Petition for Writ of Certiorari to the Clerk's Office of the Supreme Court of the United States, and hand delivered THREE (3) copies to counsel of record for the Respondent, James P. McElligott, Jr., Esquire, McGuire, Woods, Battle & Boothe, One James Center, Richmond, Virginia 23219, on February 22, 1994.

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